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COMPREHENSIVE EXAMINATION OF THEMATIC ISSUES RELATING TO RACIAL DISCRIMINATION

The concept and practice of affirmative action

Preliminary report submitted by Mr. Marc Bossuyt, Special Rapporteur, in accordance with Sub-Commission resolution 1998/5

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Introduction

1. In its decision 1999/105, the Sub-Commission on the Promotion and Protection of Human Rights, recalling its resolution 1998/5 and noting Commission on Human Rights resolution 1999/81 and Economic and Social Council decision 1999/253, decided to renew its authorization to the Special Rapporteur on the concept and practice of affirmative action to request the United Nations High Commissioner for Human Rights to send a questionnaire to Governments, international organizations and non-governmental organizations, inviting them to provide all relevant national documentation on the subject of affirmative action.

2. On 6 June 2000, the questionnaire (annex) was sent by the Office of the United Nations High Commissioner for Human Rights (OHCHR), to Governments, international organizations and non-governmental organizations.

3. As the time available was too short to expect Governments to respond to a questionnaire sent to them, the present preliminary report will contain a first section providing an analysis of international conventions containing provisions relating to the concept of affirmative action and a second section, based mainly on the examination of legal doctrine, on the limits international law sets on affirmative action measures.

I. THE CONCEPT OF AFFIRMATIVE ACTION IN INTERNATIONAL LAW

4. The concept of affirmative action is generally referred to in international law as "special measures". The first mention of these "special measures" was made by the Government of India during the drafting of the International Covenant on Economic, Social and Cultural Rights (ICESCR). India suggested that an explanatory paragraph should be included in the text of article 2 specifying that:

> "Special measures for the advancement of any socially and educationally backward sections of society shall not be construed as distinctions under this article. Alternatively, the Committee might wish to insert in its report a statement, which would make that interpretation clear."[1]

5. The representative of India pointed out that the implementation of the principles of non-discrimination raised certain problems in the case of the particularly backward groups still to be found in many underdeveloped countries. In his country, the Constitution and the laws provided for special measures for the social and cultural betterment of such groups. Measures of that kind were essential for the achievement of true social equality in highly heterogeneous societies. As he felt certain that the authors of the draft covenant had not intended to prohibit such measures, which were in fact protective measures, he therefore thought it essential to make it clear that such protective measures would not be construed as discriminatory within the meaning of the paragraph. His proposal was withdrawn, although expressly supported by other representatives. However, it was felt that the "difficulty experienced by the Indian representative would best be met by the inclusion of an interpretative statement in the Committee's records, rather than insertion of an additional paragraph in the draft Covenant".[2]

6. According to Craven the ICESCR does not envisage an absolute equalization of result in the sense of achieving an equal distribution of material benefits to all members of society. It does, however, recognize a process of equalization in which social resources are redistributed to provide for the satisfaction of the basic rights of every member of society, based on the idea of equality of opportunity.[3] In its first General Comment, the Committee on Economic, Social and Cultural Rights states that an initial step towards the realization of the Covenant rights is to identify the disadvantaged sectors of the population, which should be the focus of positive State action aimed at securing the full realization of their rights.[4]

7. The idea of equality of opportunity is specifically to be found in articles 7 (c) and 13 (2) (c) of that Covenant. Article 7 (c), in particular, specifies that the only legitimate considerations in achieving equality of opportunity for promotion are seniority and competence. Craven argues that States would appear to be under an obligation to eliminate all other barriers to promotion that might exist both de jure and de facto. In particular, this may require the adoption of positive measures to promote the opportunities of groups in society that are under-represented in higher management positions. Article 13 (2) (c) provides that higher education shall be made equally accessible to all on the basis of capacity. That positive measure may be taken on behalf of certain groups in society is confirmed by the text of article 10 (2) and (3) of the Covenant that provides for special measures of protection to be accorded to mothers before and after childbirth and to children, especially in the workplace.

8. However, Craven further adds that all the articles do appear to rule out the possibility of quotas being imposed in the contexts of promotion in employment and access to higher education. They prohibit advantages being given on grounds other than seniority, competence and capacity. Craven believes, though, that a case could be made for the operation of quota systems in each case on the basis that the terms of the articles are open to "progressive achievement". Thus, a system in which a proportion of places in higher education is set aside for students of a particular group could be justified, if it could be shown that it would ultimately contribute to the achievement of equal access on the basis of capacity at some stage in the future. Even then, that wider concerns of social utility could not be used as justificatory evidence means that the possibilities for imposing quotas with respect to higher education and employment are strictly limited.

9. Particularly interesting also are the general comments of the Committee on Economic, Social and Cultural Rights (CESCR). General Comment No. 5 has included "disability" as ground on which special treatment can be justified. An explicit disability-related provision in the ICESCR is absent, probably due to lack of awareness, but in its general comment, the Committee stated clearly:

> "The obligation of States parties to the Covenant to promote progressive realization of the relevant rights to the maximum of their available resources clearly requires Governments to do much more than merely abstain from taking measures which might have a negative impact on persons with disabilities. The obligation in the case of such a vulnerable and disadvantaged group is to take positive action to reduce structural disadvantages and to give appropriate preferential treatment to people with disabilities in order to achieve the objectives of full participation and equality within society for all

> persons with disabilities. This almost invariably means that additional resources will need to be made available for this purpose and that a wide range of specially tailored measures will be required."[5]

10. In General Comment No. 13, it is maintained that the adoption of temporary special measures intended to bring out de facto equality for men and women and for disadvantaged groups is not a violation of the right to non-discrimination with regard to education, so long as such measures do not lead to the maintenance of unequal or separate standards for different groups, and provided they are not continued after the objectives for which they were taken have been achieved. Therefore, in some circumstances, separate educational systems or institutions for groups shall be deemed not to constitute a breach of the Covenant.[6]

11. When the Third Committee of the General Assembly discussed the non-discrimination provisions of the International Covenant on Civil and Political Rights (ICCPR), the representative of India raised his point again and suggested that article 2 (1) of the ICCPR should be followed by an explanatory paragraph reading: "Special measures for the advancement of any socially and educationally backward sections of society shall not be construed as distinctions under this article."

12. He stated that, owing to past treatment or historical circumstances, a certain sector of the people had to be given greater privileges and protection only for a certain period of time in order to promote the rights of those people to re-establish their equality and conditions under which there would remain no need for such provisions, and equal opportunities would exist for all. If the Committee did not favour the insertion of that paragraph in the draft covenant, a passage of similar content should be included in the Committee's report. The Committee again endorsed the point made by the representative of India and stated that that interpretation, to which there was no objection, should be specially mentioned in the report.[7] The same views were held on article 26.[8]

13. In its general comment on article 26 of the ICCPR, which is a general non-discrimination clause, the Human Rights Committee pointed out that

> "the principle of equality sometimes requires States parties to take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the Covenant. For example, in a State where the general conditions of a certain part of the population prevent or impair their enjoyment of human rights, the State should take specific action to correct those conditions. Such action may involve granting for a time to the part of the population concerned certain preferential treatment in specific matters as compared with the rest of the population. However, as long as such action is needed to correct discrimination in fact, it is a case of legitimate differentiation under the Covenant".[9]

14. The practice of the Human Rights Committee confirmed its view on affirmative action. During the consideration of a report of Sweden, it was recalled that article 26 does not only refer to equality before the courts but also to equal protection of the law:

"Article 26 of the Covenant referred not merely to the, as it were, negative or passive aspect of the prevention of discrimination through guarantees of equality before the law - an aspect already covered by article 14 of the Covenant - but also to the positive aspect of 'active protection against discrimination' on the various grounds enumerated."

15. The representative of the Government of Sweden replied that he "agreed that article 26 called for positive action for the elimination of discrimination, and not merely passive measures of prevention".[10]

16. In the case Stalla Costa v. Uruguay, the author complained of the preferential treatment, regarding the reinstatement to the public service of former public officials who had previously been unfairly dismissed on ideological, political, or trade union grounds. The author complained that this preferential treatment unfairly prejudiced his own chances of gaining a public-service job. The alleged discrimination was found to be permissible affirmative action in favour of a formerly disadvantaged group. The Committee considered the Act conferring such preferential treatment to be a "remedy" for persons who had previously suffered from violations of article 26.[11]

17. In Ballantyne, Davidson and McIntyre v. Canada, the Committee found that it was not necessary, in order to protect the vulnerable position in Canada of the francophone group, to prohibit commercial advertising in English. This protection may be achieved in other ways that do not preclude the freedom of expression, in a language of their choice, of those engaged in such fields as trade.[12] Thus, the affirmative action provision in this case was found to go too far, it was disproportionate to its ends.

18. The following inferences can be made on the basis of the two International Covenants. During the drafting of the ICRSCR and the ICCPR, it was generally accepted that a prohibition of discrimination and distinction, respectively, did not preclude positive measures being taken in favour of disadvantaged groups. It was generally agreed that the prohibition was only aimed at distinction of an unfavourable kind lacking any objective or reasonable basis. Moreover, it was also widely accepted that equality did not mean identity of treatment and that there were cases in which the law was justified in making distinctions between individuals or groups.

19. Therefore, according to Thornberry, it can be concluded that the concept of affirmative action is not contrary to the law of the Covenants.[13] In the same vein, Vijapur argues that the principle of non-discrimination in international human rights law clearly implies compensatory unequal treatment of individuals and groups who do not differ from the majority by their nationality, language or religion but only by their social and economic backwardness. He finds support for his conclusion in the inclusion of special protection clauses in human rights instruments.[14] Some authors even believe that the gist of the general comments is that affirmative action to implement the ICCPR's non-discrimination obligations is mandatory.[15] Yet, it should be stressed that neither of the Covenants has explicitly recognized the obligatory nature of affirmative action.[16] Nor are the form of affirmative action and situation in which such action must be taken defined, owing to the complexity of the issue.

20. The International Labour Organization (ILO) has been a pioneer in using mainly promotional conventions to realize defined objectives and policies. The ILO has also set out

standards to be achieved, consequent with the principle of equal remuneration for work of equal value, incorporated into the ILO Constitution, and of equality of all human beings, irrespective of race, creed or sex, as proclaimed in the 1944 Declaration Concerning the Aims and Purposes of the ILO, adopted by the International Labour Conference at Philadelphia.

21. The ILO Discrimination (Employment and Occupation) Convention of 1958 (No. 111), which was chiefly aimed at racial discrimination but is applicable to other forms of discrimination as well, engages each member State to undertake to pursue a national policy designed to promote equal opportunities and treatment in respect of employment and occupation with a view to eliminating any discrimination, enacting legislation to that effect and seeking the cooperation of employers' and workers' organizations and other appropriate bodies (arts. 2 and 3). Article 5 is one of the first articles in an international treaty to permit explicitly "special measures of protection or assistance" designed to meet the particular requirements of persons who, for reasons such as sex, age, disablement, family responsibilities or social or cultural states, are generally recognized as requiring special protection or assistance. It is clearly stated that these special measures will not constitute discrimination.

22. In 1960, a similar Convention relating to the field of education was adopted in the framework of UNESCO. The UNESCO Convention against Discrimination in Education singles out, in its article 1, as a discriminatory act the establishing or maintaining of separate educational systems. Article 2, however, qualifies that prohibition. It allows: (i) separate educational systems set up for pupils of the two sexes on an equivalent basis; (ii) educational systems separated for religious or linguistic reasons, offering an education which is in keeping with the wishes of the pupil's parent or legal guardians, on an optional basis and if the education provided conforms to certain standards; (iii) private educational institutions, if their object is not to exclude any group but to provide educational facilities in addition to those provided by the public authorities, under certain conditions. This article does not refer to special measures of favourable discrimination, but only determines when separate educational systems will not be deemed to constitute discrimination. Moreover, it does not explicitly provide for special public schools.

23. Article 5 of the same Convention relates to the right of members of national minorities to carry on their own educational activities, such as the teaching of their own language, provided that this right is not exercised in a manner which prevents the members of those minorities from understanding the culture and language of the community as a whole and from participating in its activities, or which prejudices national sovereignty. The standard of such education should not be lower than the general standard and attendance at such schools should be optional. States parties have to undertake all necessary measures to ensure the application of this right, but there is no suggestion that the State is obliged to provide financial or other assistance to the group. Thornberry labels this a case of negative rather than positive freedom.[17] The travaux préparatoires also indicate that special measures aimed at meeting special requirements of persons in particular circumstances, such as backward children, the blind, immigrants and illiterate populations, were not "unjustified" preferences, but would rather raise deprived persons to a condition of genuine equality.[18]

24. The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) adopted in 1966, deals in paragraph 4 of article 1 with what was called "favourable discrimination": measures taken in favour of certain racial or ethnic groups or individuals in order to ensure to them equal enjoyment or exercise of human rights and fundamental freedoms

> "Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved."

25. This paragraph should be related to article 2, paragraph 2, of the same Convention which imposes on States parties the duty to take special measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms. It was underlined that protection of certain groups did not constitute discrimination, provided that such measures were not maintained after the achievement of the aims for which they had been taken.

26. Both articles find their origin in article 2, paragraph 3, of the United Nations Declaration on the Elimination of all Forms of Racial Discrimination adopted in 1963. The reason that the Convention deals twice with the same problem is that while article 1 defines discrimination and its paragraph 4 refers to a case in which the application of different treatment should not be deemed discriminatory, article 2 relates to duties which are imposed by the Convention on States parties; both insist upon the temporary character of the special measures, a reaction that was inspired by the then existing system of apartheid. In the debate on the paragraph on special measures, some representatives were concerned that special measures could be used as a weapon by Governments anxious to perpetuate the separation of certain groups from the rest of the population, or to justify colonialism. However, it was made clear that the aim should not be to emphasize the distinctions between different racial groups, but rather to ensure that persons belonging to such groups could be integrated into the community, in order to attain the objective of equal development for all citizens.[19]

27. An application of article 1, paragraph 4, was made in the Australian case of Gerhardy v. Brown, where the 1978 Pitjantjatjara Land Rights Act was disputed as being racial discrimination.[20] The Land Rights Act aimed to prevent any person other than a Pitjantjatjara entering the Pitjantjatjara land, in the north-west of South Australia, without a permit from the corporate body of the Pitjantjatjara. The defendant Brown was an Aborigine, though not a Pitjantjatjara and thus not permitted to enter. The Australian High Court held that there was no discrimination, because the Land Rights Act was deemed to be a special measure within the meaning of article 1, paragraph 4, of the ICERD. However, five of the seven judges held that in the absence of article 1, paragraph 4, the provisions would have been discriminatory because they made a distinction between Pitjantjatjara and non-Pitjantjatjara, one element of which was the proposition that to be Pitjantjatjara was to be a member of a race. Thus, the judges rejected

the argument that the Land Rights Act merely recognized traditional ownership and was therefore not discriminatory on the basis of race but a reasonable response to a traditional relationship with land.

28. According to Brown, the Australian judges treated article 1, paragraph 1, of the ICERD as being very much a prohibition on any formal discrimination by reference to a criterion containing any element of race irrespective of its "legitimacy".[21] It follows that any provision containing notions of aboriginality will be prima facie discriminatory unless it can be categorized a "special measure". But, according to Brown, the fact that a primary criterion involves a reference to race does not make the rule discriminatory in law, provided the reference to race has an objective basis and a reasonable cause. It is only when the reference lacks a reasonable cause and is arbitrary that the rule concerned becomes discriminatory in the legal sense. In the case of the traditional ownership rights of the Pitjantjatjara, however, two other criteria were relevant, that of tribal origin and that of traditional ownership. The fact that this traditional ownership is peculiar to a particular group of Aborigines does not make recognition of such land rights discriminatory. The legal recognition has an objective basis; it is not arbitrary and is discriminatory only in the sense that a reasonable and legitimate policy coincides with racial origin. Secondly, the modalities of the different treatment must not be disproportionate in effect to other groups. This is a matter of assessment in relation to particular facts, specifically in the case of recognition of land rights, where the restriction on freedom of movement raises the issue of proportionality. In other words, Brown maintains, even when the different treatment is not discriminatory in a legal sense, the modalities, and the method of implementation, may be unreasonable and hence discriminatory at the second level.

29. The Seminar on the elimination of all forms of racial discrimination, held in 1968, undertook an important discussion on the legitimacy of reservations and quotas. According to one view, reservations and quotas were a fundamental means of promoting equality in law and in fact for persons who had been victims of discrimination, but others believed that it would be preferable to make special facilities available to backward groups in order to enable them to meet the general standards of merit. Though the second view is attractive, systems of reservations and quotas are not necessarily inconsistent with the principle of equality, as long as they are of a strictly temporary nature and are maintained no longer than is necessary to achieve the objectives for which they are imposed, i.e. the rescue of backward groups from their economic and cultural disabilities. The crucial point was made that although under certain circumstances reservations and quotas may be appropriate, they must always be of limited duration.[22]

30. The importance of the UNESCO Declaration on Race and Racial Prejudice of 1978, although only a declaration, cannot be underestimated as it was widely supported, being adopted unanimously by acclamation. It is considered to have become part of the international law of human rights, being a comprehensive international instrument that deals with the protection of cultural and group identity and the value of diversity. In article 1 of the Declaration, it is stated that all individuals and groups have the right to be different, to consider themselves as different and to be regarded as such. The right to be different should not, however, serve as a pretext for racial prejudice nor justify discriminatory practices, nor provide a ground for the policy of apartheid. Article 9, paragraph 2, requires that special measures be taken to ensure equality in dignity and rights for individuals and groups wherever necessary, while ensuring that they are

not such as to appear racially discriminatory. This article does not mention "adequate advancement" as an aim of special measures, which makes the Declaration a bit less paternalistic and shows due respect to different groups.

31. The article further states that particular attention should be paid to racial or ethnic groups which are socially or economically disadvantaged, so as to afford them, on a completely equal footing and without discrimination or restriction, the protection of the laws and regulations and the advantages of the social measures in force, in particular in regard to housing, employment and health and to facilitate their social and occupational advancement, especially through education.[23] The fact that the article refers explicitly to social and economic measures is new; moreover, these measures also involve an obligation to respect the authenticity of the culture and values of the persons who are the object of the measures. In the same vein, the preamble strongly opposes any form of assimilation. The innovative aspect of this Declaration is that it asserts the need for affirmative action and at the same time recognizes the right to be different.

32. The Convention on the Elimination of All Forms of Discrimination against Women of 1979 had a precedent in article 3 of the International Covenants:

> "The States Parties to the present Covenant undertaken to ensure the equal right of men and women to the enjoyment of all economic, social and cultural (civil and political) rights set forth in the present Covenant".

33. Many representatives thought that this article was merely a duplication of the general non-discrimination clauses in article 2 of the ICCPR and of the ICESCR, and in article 26 of the ICCPR. It was pointed out, nevertheless, that article 3 did not merely state the principle of equality but enjoined States to make equality an effective reality.[24] As such, the Human Rights Committee asserted in its General Comment No. 4 that article 3, like articles 2 (1) and 26 insofar as those articles primarily deal with the prevention of discrimination on a number of grounds, of which sex is one, requires not only measures of protection but also affirmative action designed to ensure the positive enjoyment of rights. This cannot be done by simply enacting law.[25]

34. In 1975 the ILO adopted a Declaration on Equality of Opportunity and Treatment for Women Workers.[26] Article 2, paragraph 2, states unambiguously that positive special treatment during a transitional period aimed at effective equality between the sexes shall not be regarded as discriminatory.[27] According to MacKean, this formulation neatly summarizes the thesis that true equality sought by international instruments does not necessarily require identical treatment of all, but that special ameliorative measures are perfectly consistent with equality and do not constitute discrimination so long as they are not continued after the need has disappeared. In the same vein, UNESCO decided in 1979, in view of the handicaps facing girls and women, that until "full equality" of education and training opportunities was assured, there was a need for special programmes for girls and women, so as to enable them to reduce and eventually eliminate the gap.[28]

35. During the drafting of the Convention on the Elimination of All Forms of Discrimination against Women (hereafter "Women's Convention") the question of special measures was

discussed. It was emphasized that the establishment of temporary conditions for women aimed at establishing de facto equality should not be considered discriminatory. Article 4 provides explicitly:

> "1. Adoption by States Parties of temporary special measures aimed at accelerating de facto equality between men and women shall not be considered discrimination as defined in the present Convention, but shall in no way entail as a consequence the maintenance of unequal or separate standards; these measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved.
>
> "2. Adoption by States Parties of special measures, including those measures contained in the present Convention, aimed at protecting maternity shall not be considered discriminatory."

36. That this article was controversial appears from the reactions of France and the United Kingdom who insisted that the Convention should in no way require Governments to impose "reverse discrimination", by which they meant "discrimination in favour of women", since - save in certain carefully defined circumstances - this would represent a permanent departure from the objective of equal status and opportunities and would not be in the long-term interest of women themselves. On the other hand, the Convention should permit, but not require, temporary affirmative action measures in special fields to equalize opportunities for women in situations where it was necessary to overcome an undesirable historical link. States admitted that although this might appear to be discriminatory, it was necessary to right wrongs done against women in the past because of their sex. However, it was stressed that this should be seen essentially as a temporary measure which in the long term should become unnecessary.[29]

37. Problematic for some States were also the special protection measures concerning maternity. Some States felt that one's physical constitution was not a matter of sex but something that applied to both women and men. MacKean considers that the controversy was due to widespread confusion over terminology: "If 'equal treatment' always means the 'same' or 'identical' treatment, then of course special measures are unequal, but if equality is used in a normative sense then the difficulty disappears. Similarly, if discrimination means unjustifiable or unreasonable differentiations then the question arises whether certain measures are objectively justifiable. This can easily be shown for measures designed to protect women's physiological function, particularly childbearing, but as the ILO has shown, it is increasingly recognized that measures designed to protect women as such because of their physical nature might equally well be applied to some men."[30] Moreover, there was a lack of consensus during the drafting as to whether a convention should deal with equality between men and women or the elimination of discrimination against women.

38. Vogel-Polsky stated in her study, commissioned by the Steering Committee for Equality between Men and Women of the Council of Europe (CDEG), that States that had become parties to the Convention without making reservations on article 4 not only bound themselves to eliminate discrimination against women, but also took upon themselves the obligation to restore the balance between men and women in every aspect of social life through appropriate measures, more specifically affirmative action.[31] However, this position appears rather extreme. From the travaux préparatoires and the intention of the authors, it is important to note that this convention

is promotional and programmatic and does not impose immediately binding legal obligations. Article 4 merely creates the possibility to achieve de facto equality through affirmative action, and acknowledges that affirmative action is not to be considered discriminatory.[32] The Committee on the Elimination of All Forms of Discrimination against Women, nevertheless, took note of the still present need for action to implement fully the Convention by introducing measures to promote de facto equality between men and women. It recommended States parties to make more use of temporary special measures such as positive action, preferential treatment or quota systems to advance women's integration into education, the economy, politics and employment.[33]

39. The subsequent articles of the Women's Convention guaranteeing diverse rights stipulate each in an intentionally repetitive way that member States shall take "all appropriate" measures. Vogel-Polsky argues that because the Convention refers to "all appropriate measures" in an obligatory manner, it renders the "temporary special measures" referred to in article 4 not only indispensable but, combined with the fact that the Convention seeks equality in fact, the most appropriate measures to use. Vogel-Polsky maintains that this interpretation of the relationship between the various rights in the Convention and article 4 (which universally sanctions affirmative action) is directly inspired by the principle of "appropriate or full effect" ("effet utile") of international law.[34] The CEDAW seems to agree with this interpretation.

40. In its General Recommendation No. 23 on political and public life the Committee refers to temporary special measures in the following way:

> "While removal of de jure barriers is necessary, it is not sufficient. Failure to achieve full and equal participation of women can be unintentional and the result of outmoded practices and procedures which inadvertently promote men. Under article 4, the Convention encourages the use of temporary special measures in order to give full effect to articles 7 and 8. Where countries have developed effective temporary strategies in an attempt to achieve equality of participation, a wide range of measures [have] been implemented, including recruiting, financially assisting and training women candidates, amending electoral procedures, developing campaigns directed at equal participation, setting numerical goals and quotas and targeting women for appointment to public positions such as the judiciary or other professional groups that play an essential part in the everyday life of all societies. The formal removal of barriers and the introduction of temporary special measures to encourage the equal participation of both men and women in the public life of their societies are essential prerequisites to true equality in political life. In order, however, to overcome centuries of male domination of the public sphere, women also require the encouragement and support of all sectors of society to achieve full and effective participation, encouragement which must be led by States parties to the Convention, as well as by political parties and public officials. States parties have an obligation to ensure that temporary special measures are clearly designed to support the principle of equality and therefore comply with constitutional principles which guarantee equality to all citizens."[35]

II. LIMITS SET ON AFFIRMATIVE ACTION MEASURES

41. International law sets major limits on affirmative action measures. These are:

(a) Affirmative action measures may not lead to discrimination;

(b) Affirmative action measures need to be temporary.

A. The prohibition of non-discrimination

42. Of particular importance when assessing affirmative action measures is their relationship with the principle of non-discrimination, which is the reverse formulation of the principle of equality and one of the most - if not the most - fundamental human rights. The principle of equality has been solemnly affirmed in the 1948 Universal Declaration of Human Rights, which states, "All human beings are born free and equal in dignity and rights", and in Article 1 of the Charter of the United Nations which asserts as one of the goals of the Organization "to achieve international cooperation (...) in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion". A similar provision is contained in all the human rights instruments of the international regional systems, such as the Council of Europe, the Organization of American States and the Organization of African Unity.

43. Non-discrimination is primarily a legal technique employed to counteract unjustified inequality, founded on the idea that a State may not legitimately disadvantage an individual on an arbitrary basis.[36] The prohibition of discrimination can be found in all international instruments.

44. Non-discrimination and affirmative action if not carefully framed may clash with each other. Where the non-discrimination principle removes factors such as race, gender, nationality, etc. from the society's decision-making processes, affirmative action seeks to ensure full and substantive equality by taking those factors into account.[37] However, affirmative action, in its desire to achieve equality, can sometimes use extreme measures and thereby violate the non-discrimination principle. Therefore, affirmative action policies must be carefully controlled and not be permitted to undermine the principle of non-discrimination itself. In order to understand when affirmative action becomes discrimination, it is worth while having a close look at the travaux préparatoires of several international instruments containing non-discrimination principles.

45. During the preparation of the non-discrimination provision in article 7 of the Universal Declaration, the Chairman of the United Nations Commission on Human Rights, Eleanore Roosevelt, stated that equality did not mean identical treatment for men and women in all matters, for there were certain cases where differential treatment was essential. This was a clear reaffirmation of the idea that "equality" was not only to be understood in its normative sense but also in its formal sense.[38] According to Lauterpacht, it implies equality relative to the situation.[39]

46. The ambiguous terminology in the non-discrimination provisions of international human rights, which have used the terms "distinction" and "discrimination" interchangeably to cover the same concept, has created great confusion.[40] For example, there is an inconsistency in article 2 of the International Covenants: the International Covenant on Economic, Social and Cultural Rights guarantees that "the rights enunciated in the present Covenant will be exercised without discrimination of any kind", whereas the International Covenant on Civil and Political Rights guarantees "the rights recognised in the present Covenant without distinction of any kind".

47. Article 14 of the English version of the European Convention on Human Rights states: "the enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status", while the French version uses the term "distinction".

48. Although no explicit explanation is offered in the travaux préparatoires for these inconsistencies, it should be admitted that, whatever word was used, the drafters intended to include in both Covenants and in the European Convention the same level of protection. Both terms clearly exclude only "discrimination" understood as "arbitrary" or "unjust distinction".

49. The concept that not all distinctions are unlawful was crucial during the drafting of article 2, paragraph 2, of the International Covenant on Economic, Social and Cultural Rights, where an overwhelming majority endorsed a three-Power amendment (Argentina, Italy and Mexico) to replace the word "distinction" with the word "discrimination".[41] The stated purpose was to confirm that certain distinctions might be justified to promote the position of certain backward and underprivileged sectors of the population.

50. Similarly, in its General Comment on article 26, the general non-discrimination principle of the International Covenant on Civil and Political Rights, the Human Rights Committee added that "the enjoyment of rights and freedoms on an equal footing, however, does not mean identical treatment in every instance" and that "not every differentiation of treatment will constitute discrimination".[42]

51. In the same vein, the European Court of Human Rights affirmed in the Belgian Linguistics case that:

> "In spite of the very general wording of the French version ('sans distinction aucune'), article 14 does not forbid every difference in treatment in the exercise of the rights and freedoms recognised. This version must be read in the light of the more restrictive text of the English version ('without discrimination')."[43]

52. The concept of non-discrimination has further been clarified by a number of studies carried out by special rapporteurs of the Sub-Commission.[44] Modern legal doctrine makes the following conclusions:

(a) Nowadays, it is universally accepted that the term "discrimination" has to be reserved for arbitrary and unlawful differences in treatment.[45] "Distinction", on the other hand,

is a neutral term, which is used when it has not yet been determined whether a differential treatment may be justified or not. The term "differentiation", on the contrary, points to a difference in treatment, which has been deemed to be lawful,[46]

(b) Consequently, not every different treatment is prohibited - only those treatments that result in discrimination. This raises the question of when differential treatment becomes unacceptable, or when a distinction of any kind can be justified.[47]

53. International courts and authors looked for criteria which enabled a determination to be made as to whether or not a given difference in treatment contravened the non-discrimination principle.

54. In the South West Africa cases, Judge Tanaka affirmed that equality being a principle and different treatment an exception, those who refer to the different treatment must prove its raison d'être and its reasonableness; it must not be given arbitrarily but be in conformity with justice.[48]

55. In the Belgian Linguistics case, the European Court, following principles which may be extracted from the legal practice of a large number of democratic States, held that

> "the principle of equality is violated if the distinction has no objective and reasonable justification. The existence of such a justification must be assessed in relation to the aim and effects of the measure under consideration, regard being had to principles which normally prevail in democratic societies. A difference of treatment in the exercise of a right laid down in the Convention must not only pursue a legitimate aim: Article 14 is likewise violated when it is clearly established that there is no reasonable relationship of proportionality between the means employed and the aim sought to be realised."[49]

56. These principles have been repeatedly applied in a great number of later cases.[50]

57. The United Nations Human Rights Committee has followed the European Court of Human Rights in its position, and declared in its views and General Comment No. 18 that:

> "not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant".[51]

58. Various authors have also analysed the different constitutive elements of discrimination.[52] One of these elements is the ground on which the distinction is based. The enumeration of the prohibited grounds in general human rights instruments is non-exhaustive. This follows clearly out of the enlargement of the four grounds enumerated in the Charter (race, language, religion and sex) to the 12 grounds in the Universal Declaration of Human Rights and both Covenants, to the 13 grounds in the European Convention on Human Rights, as well as from the use of the words "such as" which precede the enumeration of these grounds.

59. Consequently, a distinction based on another ground can be arbitrary and some distinctions based on some of the enumerated grounds are not necessarily illegitimate. The ground on which a distinction is based is nevertheless important in determining whether the

distinction is arbitrary or not. However, it is not the ground itself that is decisive, but the relationship or the connection between the ground and the right on which the distinction is practised. There needs to be a "sufficient connection" between the right and the ground or, in other words, the ground has to be deemed "relevant" for the specific right in which the distinction is practised. The general aim or the goal pursued by the legislation in question is not decisive, but the relevance of the particular ground with respect to the particular rights is. A distinction introduced by legislation in the pursuit of a perfectly legitimate goal can nevertheless be discriminatory - and as such constitute a violation of human rights - if the ground on which the distinction is based cannot be deemed relevant to the right in question.

60. Replacing the notion of "irrelevant" by the notion of "arbitrary" is not just substituting one word for another. The difference lies in the level at which the illegitimate character of the distinction has to be assessed. If this level were to be situated in relation to the general aims and goals of the legislation, the assessment would be purely political and inappropriate for judicial determination. The whole point, however, is that a legal rule is not necessarily legitimate because it pursues a legitimate goal. The law as a technique used to attain certain goals has to respect certain inherent requirements. The most fundamental of these is the respect of the equality principle, which prohibits the introduction of distinctions based on grounds which are irrelevant for the particular right or freedom.

61. While still requiring a value judgement, which can be influenced by political considerations, the evaluation of the relevance of the ground by assessing the connection between this ground and the right or freedom concerned remains a judicial act. The previous identification of the ground (on which the distinction is based) and of the matter (in which the distinction is practised) as a right reduces the political element to a strict minimum and safeguards the judicial character of the evaluation. The approach should not be basically different when evaluating distinctions introduced in the framework of a policy of "affirmative action".

62. There is no doubt that special measures may be necessary in order to ensure full equality for categories of the population which, sometimes for centuries, have suffered from a disadvantaged position in society. But it should be clear that not every measure taken in pursuit of such a policy should be accepted as legitimate regardless of the ground of distinction made or the nature of the right conferred. Even if it is established that the distinctions made in the framework of an affirmative action policy are based on the same ground as the one which was the basis of previously unequal situations, the legal rules concerned should still be subject to the equality test.

63. The simple fact that a particular category of the population has suffered from disadvantaged economic or social conditions does not mean that in order to upgrade its material position any distinction based on the characteristic defining the group should be considered legitimate, even if this ground is irrelevant as a basis of distinction with regard to a particular right. It would not be justifiable to provide special social benefits to persons who do not need them but who belong to the category which used to be in a disadvantaged condition, and to refuse the same benefits to persons who do need them but belong to the category which previously enjoyed better conditions in society.

64. Affirmative action should be centred on taking measures expected to meet the particular needs of the category it is intended to favour, rather than on restricting the benefits of the measures on the basis of the element which distinguishes that category from the other members of the population, but which is not relevant for the right concerned. It is in choosing the measures, their timing and their location that the policy can favour the target category, without violating the rights - including their right to equal protection of the law without discrimination - of persons not belonging to that category. In no case may someone be deprived of a basic right under the pretext that doing so would help particularly disadvantaged groups better to overcome the consequences of previous discrimination.[53]

65. An affirmative action programme provision should not be interpreted as justifying any distinction based on any ground with respect to any right merely because its object is the amelioration of disadvantaged individuals or groups. Such an interpretation would justify absurd legislation in total disrespect of human rights and its fundamental principle of equality or non-discrimination.

B. Affirmative action measures need to be temporary

66. The requirement of "limited duration" of special measures has been continually stressed in international law. It has been maintained that although the acceptance of affirmative action is not contrary to international law, it does not allow ignoring the limits of affirmative action sanctioned by the Covenants.[54] The granting of affirmative action measures may not as a consequence lead to the maintenance of unequal or separate standards and they shall be discontinued after the objectives for which they have been taken have been achieved.[55]

67. It is absolutely to be avoided that affirmative treatment would lead to stigmatization or to a situation of "separate but equal", a doctrine previously used in the United States according to which Blacks were given the same rights as Whites but were forced to exercise these rights in isolation, or, worse, to a new apartheid.[56] The "limited duration" requirement reveals the difference between two overlapping notions in international law, i.e. the "protection of minorities" and "prevention of discrimination".

68. Obviously, both minorities and disadvantaged groups can appeal to the non-discrimination principle protecting them against discrimination by reference to their race, colour, descent, national or ethnic origin, language. Likewise, they can be both beneficiaries of special measures, under the conditions mentioned, i.e. limited duration and the measures must not lead to discrimination themselves, to overcome past discriminatory treatment or structural discrimination.

69. However, it is clear that special measures of this kind are not sufficient to cover the issues raised regarding the exercise of the rights of persons belonging to minorities to enjoy their own culture, to profess and practise their own religion, or to use their own language. The exercise of these rights requires permanent measures of protection taken by States, which is a wider notion.

70. The concept of "protection of minorities" is one the oldest concerns of international law, finding its origin in the rise of the nation-State in the sixteenth and seventeenth centuries, which

necessitated consideration for minority groups.[57] Many treaties were concluded for the benefit of specific groups, for example the Treaty of Paris of 30 March 1856 which contains provisions referring to the protection of Christian minorities in the Ottoman Empire. The Treaty of Berlin of 13 July 1878 is of particular interest because of the special legal status it accorded to some religious groups. The protection in these treaties was only partial and no machinery was established. Nevertheless, they served as a model for the "minorities system" that was subsequently established within the framework of the League of Nations.[58]

71. The treaties concluded under the "minorities system" were complex in their wording, but a survey of their provisions shows that they envisaged two aims:[59]

1. The principle of non-discrimination guaranteed nationals belonging to racial, linguistic or religious minorities enjoyment of the same treatment in the exercise of civil and political rights.

2. The principle that persons belonging to minority groups should be guaranteed a number of special rights which enabled the minorities to preserve and develop their national culture and consciousness. In particular, they had an equal right to establish schools and religious, charitable or social institutions at their own expense. They could use their own language, even in court, and freely exercise their own religion. Further, in towns and districts where there was a considerable proportion of citizens speaking a language other than the official language of the State, adequate facilities were to be provided for instruction to be given in that language to the children of such nations in primary school. Finally, the treaties provided that in those towns and districts where there was a considerable proportion of nationals of the country belonging to racial, religious or linguistic minorities, they were assured an equitable share in the enjoyment and application of the funds which might be provided out of public Treasury under the State, municipal or other budgets for educational, religious or charitable purposes. Some treaties also mentioned a limited right to autonomy.

72. Thus, the idea underlying the minority treaties signed within the framework of the League of Nations was twofold: to allow minorities to live alongside the rest of the population in a position of equality, and to preserve the characteristics and the separate identity of minorities.

73. Important case law on these special rights was developed by the Permanent Court of International Justice, which affirmed this double-track system. Five cases were submitted by the League Council to the Permanent Court for advisory opinions: three concerning German minorities in Poland, one concerning the Polish minority in Danzig and one concerning the Greek minority in Albania.

74. The judgement of the Court on the Minority Schools in Albania case is of great significance. The dispute originated with an amendment that was introduced into the Albanian Constitution whereby all private schools were abolished throughout the country. The Greek minority maintained that the amendment was in violation of the Albanian Declaration of 1921

concerning the protection of minorities. The Government of Albania contended that, since the abolition of the private schools constituted a general measure applicable to the majority as well as the minority, it was in conformity with the Declaration.

75. More in general, the Permanent Court stated:

> "Equality in law precludes discrimination of any kind: whereas equality in fact may involve the necessity of different treatment in order to attain a result which establishes an equilibrium between different situations. It is easy to imagine cases in which equality of treatment of the majority and of the minority, whose situation and requirements are different, would result in inequality in fact ... . The equality between members of the majority and of the minority must be an effective, genuine equality."[60]

76. As for the private schools of the Greek minority in Albania, the Court pronounced:

> "The institutions mentioned are indispensable to enable the minority to enjoy the same treatment as the majority, not only in law but also in fact. The abolition of these institutions, which alone can satisfy the special requirements of the minority groups, and their replacement by government institutions, would destroy this equality of treatment, for its effect would be to deprive the minority of the institutions appropriate to its needs, whereas the majority would continue to have them supplied in the institutions created by the State."

77. Because history showed that States such as Germany relied upon these minority provisions in the treaties to intervene militarily, most of the peace treaties signed after the Second World War contained non-discrimination clauses. Only a few treaties contained clauses protecting minorities, as the abuse of the minority treaties by Germany - and the consequent failure of the League of Nations - had left minority clauses with a poor reputation.

78. The emphasis in the protection of human rights shifted from group protection to the protection of individual rights and freedoms. The new approach applied only the non-discrimination principle, which meant that whenever someone's rights were violated because of a group characteristic, be it race, religion, nationality, etc., the matter was to be taken care of by protecting the rights of the individual on a purely individual basis. The principle of equality and the premise of non-discrimination became fundamental principles, enshrined in every human rights text written after the Second World War. This new approach was fully integrated in the establishment and workings of the United Nations. However, the notion of protection of minorities was still used in some international instruments.

79. At the first session in 1947 of the United Nations Sub-Commission on the Prevention of Discrimination and the Protection of Minorities, a discussion was held on the meaning of the terms "prevention of discrimination" and "protection of minorities".[61] It was indicated that there was a fundamental difference between them. "Discrimination" implied any act or conduct that denied to individuals or groups of people the equality of treatment they may wish. Protection of minorities was described as the protection of non-dominant groups which, while wishing in general for equality of treatment with the majority, wish for a measure of differential treatment in order to preserve basic characteristics which they possess and which distinguish them from the

majority of the population. The protection belongs equally to individuals belonging to such groups and wishing the same protection. It follows that differential treatment of such groups or individuals belonging to such groups is justified when it is exercised in the interest of their contentment and the welfare of the community as a whole.

80. The notion of "protection of minorities" was further elaborated in a memorandum by the Secretary-General entitled, "The Main Types and Causes of Discrimination"[62] He argued that the protection of minorities, although similarly inspired by the principle of equality of treatment of all peoples, required positive action, such as establishment of schools where education is given in the native tongue, whenever the minorities concerned wished to maintain their difference of language and culture.[63]

81. The Secretary-General further maintained that while the goal of protection of minorities seems to differ from that of the prevention of discrimination, in reality there is no contradiction in aiming simultaneously at the protection of minorities and the prevention of discrimination. Indeed, in each case it is desired to obtain and effectively maintain equality of treatment of all peoples. Prevention of discrimination and the protection of minorities represent different developments of the same idea of equality of treatment for all peoples. One required the elimination of any distinction imposed, whereas the other required safeguards to preserve certain distinctions voluntarily maintained.

82. In his report on Protection of minorities, A. Eide[64] offered affirmative action as a solution to problems regarding minorities. However, he added that affirmative action can lead to group conflict, for which reason such measures should not be continued beyond the time when equality has been achieved.[65]

83. Affirmative action measures are temporary and compensatory, aimed at correcting conditions that impair the enjoyment of equal rights, while protective measures for minorities aim at conserving a group's identity.[66]

Notes

[1] United Nations document A/C.3/SR.1182, para. 17.

[2] United Nations document A/C.3/SR.1183, paras. 12 and 29.

[3] M. Craven, The International Covenant on Economic, Social and Cultural Rights, a perspective on its development, Oxford, Clarendon Press, 1995, p. 158.

[4] Committee on Economic, Social and Cultural Rights, General Comment 1, para. 3, in United Nations document HRI/GEN/Rev.4 (2000).

[5] Ibid., General Comment No. 5, para. 9.

[6] Ibid., General Comment No. 13, paras. 32-33.

[7] United Nations documents A/C.3/SR.1257, para. 18; A/C.3/SR.1258, paras. 18, 38, 45, 47 (UAR); A/C.3/SR.1259, para. 33. See M. Bossuyt, Guide to the "Travaux Préparatoires" of the International Covenant on Civil and Political Rights, Dordrecht, Martinus Nijhoff Publishers, 1987, p. 55.

[8] United Nations document E/CN.4/SR.122, pp. 8 and 11.

[9] Human Rights Committee, General Comment No. 18, para. 10, in HRI/GEN/1/Rev.4 (2000).

[10] United Nations document CCPR/C/SR.189, paras. 15-16. J.J. Paust ("The permissibility of affirmative action in higher education under human rights law", New York City Law Review, 1998, pp. 95-96) agrees that "equal protection" should be interpreted in a manner that allows for certain measures of affirmative action to promote an "equal" and effective "protection" against ongoing discrimination.

[11] Communication No. 198/1985, in Selected Decisions of the Human Rights Committee Under the Optional Protocol, vol. 2 (United Nations publication, Sales No. E.89.XIV.1).

[12] Communication No. 385/1989, in Official Records of the General Assembly, Forty-eighth Session, Supplement No. 40 (A/48/40), vol. II, annex XII, sect. P.

[13] P. Thornberry, International Law and the Rights of Minorities, Oxford, Clarendon Press, 1991, p. 284. Referring to article 1 (4) of the International Covenant on the Elimination of All Forms of Racial Discrimination and article 4 (1) of the Convention on the Elimination of All Forms of Discrimination against Women, which do contain explicit statements about the legitimacy of affirmative action measures, he points out that a contrary interpretation in the context of the Covenants would display an "extraordinary lack of congruence".

[14] A.P. Vijapur, "The principle of non-discrimination in international human rights law: the meaning and scope of the concept", India Quarterly, A journal of international affairs, 1993, p. 91.

[15] A.F. Beyafsky "The principle of equality or non-discrimination in international law", Human Rights Law Journal, 1990, p. 27; Lord Lester of Herne Hill and S. Joseph, "Obligations of non-discrimination", in D. Harris and S. Joseph, (eds.), The International Covenant on Civil and Political Rights and the United Kingdom Law, Oxford, Clarendon Press, 1995, p. 579.

[16] While recognizing this, M. Craven (op. cit., at note 3, p. 186) argues that, although the Committee on Economic, Social and Cultural Rights implicitly recognizes an obligation through the requirement that States concentrate upon the situation of vulnerable and disadvantaged groups in society, this is nevertheless a matter that ideally should be made clear in a future general comment.

[17] Thornberry further states that this is reinforced by article 3 (d) of the Convention by which States undertake "not to allow, in any form of assistance granted by the public authorities to educational institutions, any restrictions or preference based solely on the ground that pupils

belong to a particular group". He believes that the equality and non-discrimination promised by the Convention to minority groups is the equality and non-discrimination provided for the community as a whole, without regard to cultural differences. In any dispute involving an abuse of rights arising from an interpretation of the Convention, the balance is clearly in favour of the State, which can find ample scope to deny their practical exercise. P. Thornberry, op. cit., at note 13, pp. 289-290. He refers also to UNESCO General Conference document 11C/15 (see E/CN.4/Sub.2/210) according to whose analysis article 5 does not support the notion that States are obliged to provide public or publicly supported schools.

[18] UNESCO document 11C/15, annex III, para. 36 and E/CN.4/Sub.2/210, annex III, para. 13.

[19] See N. Lerner, The UN Convention on the Elimination of All Forms of Racial Discrimination, Alphen aan den Rijn, Sijthoff and Noordhoff, 1980, pp. 32-39. P. Thornberry, op. cit., at note 13, pp. 265-268. India especially expressed strong support for the inclusion of special measures in the Covenant and referred to its own domestic situation, where the Constitution of India expressly authorizes special measures to protect backward groups, i.e. the Scheduled Castes and Scheduled Tribes.

[20] (1985) 57 ALR 472.

[21] I. Brown, "The rights of peoples in modern international law", in J. Crawford, The rights of peoples, Oxford, Clarendon Press, 1988, pp. 8-10.

[22] See United Nations document ST/TAO/HR.34, paras. 147-155.

[23] See also article 5, paragraph 2, which points out the duties of States in education against racism and contains a clause on general affirmative action: States should take "appropriate steps to remedy the handicaps from which certain racial or ethnic groups suffer with regard to their level of education and standard of living and in particular to prevent such handicaps from being passed on to children".

[24] M. Bossuyt, op. cit. at note 7, pp. 75-79. The same arguments were used by those who considered a specific convention on women unnecessary in view of the texts already in existence. MacKean comments: "Some representatives considered that the paragraph might be taken to decree an 'absolute' or 'precise' equality or 'identity of treatment' but others urged that what was being sought was an effective equality in fact - not the abolition of differences between the roles of men and women in marriage, but rather the equitable differences of rights and responsibilities." There was certainly a feeling that de facto equality should be increased. As such, the representative of the USSR commented that the Third Committee was "elaborating principles of de jure equality; from these principles would arise the de facto equalization of human rights". He continued, "equality of rights went further than mere non-discrimination; it implied the existence of positive rights in all the spheres dealt with in the draft Covenant". W. MacKean, Equality and Discrimination under International Law, Oxford, Clarendon Press, 1983, p. 182.

[25] Human Rights Committee, General Comment No. 4, para. 2, in HRI/GEN/1/Rev.4 (2000).

[26] Adopted on 25 June 1975 by the 60th Session of the International Labour Conference. See United Nations document E/CN.6/603.

[27] The ILO had already undertaken efforts concerning equal remuneration for work of equal value. See ILO Equal Remuneration Convention, 1951 (No. 100), I. Brownlie, Basic documents on human rights, Oxford, Clarendon Press, 1981, p. 200.

[28] See United Nations document E/CN.6/632, para. 92.

[29] L.A. Rehof, Guide to the "Travaux Préparatoires" of the United Nations Convention on the Elimination of All Forms of Discrimination against Women, Dordrecht, Martinus Nijhoff Publishers, 1993, pp. 66-76.

[30] W. MacKean, op. cit. at note 24, pp. 190-191.

[31] E. Vogel-Polsky, Les actions positives et les contraintes constitutionelles et legislatives qui pèsent sur leur mise en oeuvre dans les Etats membres du Conseil de l'Europe.

[32] See also A.W. Heringa, "Voorkeursbehandeling en moederschap", in A.W. Heringa, J. Hes and L. Linjnzaad, Het Vrouwenverdrag: een beeld van een verdrag ..., Antwerpen, Maklu, 1994, pp. 33-34.

[33] Committee on the Elimination of Discrimination against Women, General Recommendation No. 5, Temporary special measures, in HRI/GEN/1/Rev.4 (2000).

[34] E. Vogel-Polsky, "Les actions positives dans la théorie juridique contemporaine", in B. De Grave, (ed.), Positieve actie, positieve discriminatie, voorrangsbehandeling voor vrouwen, Tegenspraak-Cahier 8, Antwerpen, Kluwer, 1990, p. 79.

[35] Committee on the Elimination of Discrimination against Women, General Recommendation No. 23, Political and public life, para. 15, in HRI/GEN/1/Rev.4(2000).

[36] Non-discrimination and equality constitute nowadays basic and essential principles relating to the protection of human rights. Consequently, they have also become principles of customary international law. Extensive support for this view is to found in various authoritative international instruments proclaiming the principle of non-discrimination, such as the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the International Convention on the Elimination of All Forms of Racial Discrimination, the UNESCO Declaration on Race and Racial Prejudice, etc. Furthermore, authoritative legal institutions, such as the International Law Commission and the International Court of Justice, have made declarations in that sense. See, for example, the statements of the ICJ in its Advisory Opinion on the Legal Consequences for States of the Continued Presence of South Africa in Namibia notwithstanding Security Council Resolution 276 (1970), in the Barcelona Traction case (1970), and in its Advisory Opinion on

Namibia (1971). The view is also supported by State practice and a strong opinio juris voiced at various international conferences and by authoritative experts.

[37] See United States Supreme Court Justice Blackmun's dictum: "in order to get beyond racism, we must first take race into account". Regents of the University of California v. Bakke, 438 U.S. 265, 1978.

[38] See United Nations document E/CN.4/SR.50, para. 9. For an explanation of the discussion on "distinction" and "discrimination", which reappeared later during the drafting of the International Covenants, see also J.T. Möller, "Article 7", in A. Eide, et al. (eds.), The Universal Declaration of Human Rights: A Commentary, Oslo, Scandinavian University Press, 1992, pp. 115-141.

[39] Sir Hersch Lauterpacht (An International Bill of the Rights of Man, New York, Columbia University Press, 1945, pp. 116-119) refers to section 1 of the Fourteenth Amendment of the Constitution of the United States, which states that the equal protection of the laws does not exclude distinctions between and classifications of persons so long as these are based on reasonable grounds. Early case law of the United States Supreme Court, therefore, does not forbid the segregation of blacks in schools, trains, railway stations and other public places. The Supreme Court stated that wide discretion in establishing classifications by reference to various factors is essential to and not inconsistent with the principle of true equality so long as the basis of classification is reasonable. This line of reasoning was later reformed. Lauterpacht admits that the interpretation of equality conceived as a mechanical equality of opportunity and advantage was stretched to the breaking point.

[40] On the history of this ambiguity, see M. Bossuyt, L'Interdiction de la discrimination dans le droit international des droits de l'homme, Bruxelles, Bruylant, 1976, pp. 7-27 ; N. Lerner, Group rights and discrimination in international law, Dordrecht, Martinus Nijhoff Publishers, 1991, pp. 24-28; B.G. Ramcharan, "Equality and nondiscrimination", in L. Henkin (ed.), The International Bill of Rights, New York, Columbia University Press, 1981, pp. 258-259.

[41] See United Nations document A/5365, p. 22.

[42] Human Rights Committee, General Comment No. 18, Non-discrimination, paras. 8 and 13, in HRI/GEN/1/Rev.4 (2000).

[43] European Court of Human Rights, Belgian Linguistics case, 23 June 1968, Ser. A, p. 34. The Court admitted that doing so would lead to absurd results - every legal provision which does not secure to everyone equal treatment would be contrary to article 14. This would be an untenable position, as law necessarily makes distinctions of many kinds.

[44] See for a good summary Vijapur, op. cit. at note 14, pp. 73-74. MacKean, op. cit at note 24, pp. 94-96. For example, in 1949, the Secretary-General stated in his memorandum on the main types and causes of discrimination that discrimination is a detrimental distinction based on grounds which may not be attributed to the individual and which have no justified consequences. See United Nations document E/CN.4/Sub.2/40.

[45] Bossuyt, op. cit. at note 7, p. 27. MacKean, ibid., pp. 8-11.

[46] This is consistent with the international definitions on discrimination. "Discrimination" was not defined in the Universal Declaration or in the two International Covenants. The first definition of discrimination is to be found in the International Convention on the Elimination of All Forms of Racial Discrimination which provides that the term "racial discrimination" shall mean "any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life". Similarly, the Convention on the Elimination of All Forms of Discrimination against Women provides that "discrimination against women" shall mean "any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field".

The Human Rights Committee has used these definitions of specific forms of discrimination to construct a more general definition. According to the Committee discrimination should be understood to imply "any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on equal footing, of all rights and freedoms". General Comment No. 18, para. 7.

Other definitions are to be found in the ILO Convention concerning Discrimination in Respect of Employment and Occupation, 1958 (No. 111), which states: "For the purpose of this Convention the term discrimination includes - (a) any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation ...". The UNESCO Convention against Discrimination in Education (1960) asserts: "For the purpose of this Convention, the term 'discrimination' includes any distinction, exclusion, limitation or preference which, being based on race, colour, sex, language, religion, political or other opinion, national or social origin, economic condition or birth, has the purpose or effect of nullifying or impairing equality of treatment in education ...".

[47] See C. Tomuschat, "Equality and Non-Discrimination under the CCPR", in I. Von Munch, Festschrift für Hans-Jürgen Schlochauer, Berlin, Walter de Gruyter, 1981, pp. 712-716.

[48] Dissenting Opinion of Judge Tanaka, South West Africa cases, (2nd phase), ICJ Report 1966, pp. 284-316. Judge Tanaka keenly observed that the principle of equality requires that those who are equal be treated in an equal manner, and those who are different be treated differently. However, he asserted, the principle of equality does not mean absolute equality, but recognizes relative equality, namely different treatment proportionate to concrete individual circumstances. Although people have certain common characteristics, they nevertheless possess independent

attributes and qualities, which may legitimately be taken into account in the distribution of social goods. The fundamental questions, however, remain: When can people be said to be equal or different, and which considerations may form legitimate justifications for differential treatment?

[49] European Court of Human Rights, op. cit. at note 43; M. Bossuyt, "Het discriminatieverbod van de Europese Conventie van de Rechten van de Mens in de Rechtspraak van de Commissie na het Belgisch taalarrest", Revue belge de droit international, 1972, pp. 503-528.

[50] The European Court's analysis of non-discrimination has been quoted with approval by the Inter-American Court of Human Rights in its Advisory Opinion oc-4/84, Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica of 19 January 1984, para. 57: "There would be no discrimination in differences in treatment of individuals by a state when the classifications selected are based on substantial factual differences and there exists a reasonable relationship of proportionality between these differences and the aims of the legal rule under review. These aims may not be unjust or unreasonable, that is, they may not be arbitrary, capricious, despotic or in conflict with the essential oneness and dignity of humankind".

[51] See also, T. Opsahl, "Equality in Human Rights Law, with special reference to article 26 of the ICCPR", in M. Nowak, (ed.), Kehl, N.P. Engel Verlag, 1988, pp. 51-65. Case law: S.W.M. Broeks v. Netherlands, Communication No. 172/1984, Zwaan-de Vries v. Netherlands, Communication No. 182, 1984 Official Records of the General Assembly Forty-second session, supplement No. 48 (A/42/40), annex VIII, sects. B and D: because article 26 lays down a general principle of non-discrimination, the full range of this non-discrimination signifies that the Committee has competence to review any differential treatment, even in the field of economic, social and cultural rights, in order to determine if it amounts to discrimination.

[52] Bossuyt, op. cit. at note 7, p. 262; M. Bossuyt, "The principle of equality in article 26 of the International Covenant on Civil and Political Rights", in A. De Mestral (ed.), The Limitation of Human Rights in Comparative Constitutional Law, Cowansville, Éditions Yvon Blais, 1986, pp. 283-284; E.W. Vierdag, The Concept of Discrimination in International Law with Special Reference to Human Rights, The Hague, Martinus Nijhoff, 1973, p. 176.

[53] Lord Denning: "So here if this education authority were to allocate boys to particular schools according to the colour of their hair or, for that matter, the colour of their skin, it would be so unreasonable, so capricious, so irrelevant to any proper system of education that it would be ultra vires altogether and this Court would strike it down at once. But, if there were valid educational reasons for a policy, as, for instance in an area where immigrant children were backward in the English tongue and needed special teaching, then it would be perfectly right to allocate those in need to special schools where they would be given extra facilities for learning English". As quoted by MacKean, op. cit. at note 24, p. 246.

[54] Tomuschat, op. cit. at note 47, pp. 715-716, and Thornberry, op. cit. at note 13, pp. 281-286, refer to the travaux préparatoires of the International Covenants and the discussion on time limitation for affirmative action.

[55] See also articles 1, paragraph 4, ICERD and 4, paragraph 1, Woman's Convention. The Committee on the Elimination on Racial Discrimination, during the discussion on the fourth periodic report of Fiji, pointed out that the special treatment accorded to certain racial groups did not appear to have a specified limited duration; in order to satisfy the Convention, a more categorical undertaking should have been given that the unequal rights of different racial groups would not be maintained after the objectives for which they were intended had been achieved. Official Records of the General Assembly, thirty-seventh session, supplement No. 18 (A/37/18), para. 101.

[56] Although the "separate but equal" doctrine appeared to violate the Fourteenth Amendment of the United States Constitution, the Supreme Court did not see it that way in 1896 when viewing the case Plessy v. Ferguson (163 U.S. 537, 1896). It involved a man who had been arrested for violating a Louisiana law that required railroads to provide "equal but separate accommodations" for "white and coloured" passengers. Half a century later, the doctrine was challenged in the case Brown v. Board of Education (347 U.S. 483, 1954) and the Supreme Court ruled that separate schools created a feeling of inferiority for Black students and for that reason violated the Fourteenth Amendment.

[57] See Thornberry, op. cit. at note 13, pp. 25-54, which deals extensively with the historical background.

[58] After the Congress of Vienna, treaty clauses for protection of minorities became more detailed and there was a shift away from the protection of religious groups to the protection of national minorities.

[59] P. de Azcárate, League of Nations and National Minorities: an experiment, Washington, Carnegie Endowment for International Peace, 1945, p. 216; McKean, op.cit. at note 24, pp. 14-45.

[60] Minority Schools in Albania, Advisory Opinion, PCIJ, 1935, Ser A/B No. 64, 19.

[61] This double-track system found its inspiration in the Advisory Opinion of the PCIJ on the Minority Schools in Albania, ibid. See United Nations documents E/CN.4/Sub.2/36 and E/CN.4/Sub.2/SR. 14 and 15.

[62] Op. cit. at note 44.

[63] Ibid.

[64] A. Eide, Protection of minorities: possible ways and means of facilitating the peaceful and constructive solution of problems involving minorities, (E/CN.4/Sub.2/1993/34, para. 172.

[65] In its General Comment No. 18 on the non-discrimination principle, the Human Rights Committee stated that affirmative action, i.e. special measures, may be taken only for as long it is needed to correct discrimination in fact. On the other hand, in paragraphs 6.1 and 6.2 of its General Comment No. 23 on article 27, the minorities article, it admits that although the rights

protected under article 27 are formulated in negativity terms positive measures by States may also be necessary to protect the identity of a minority and so long as they are only aimed at providing protection, they may constitute a legitimate differentiation under the Covenant. Here, no time limit is imposed. Notice also the different word use. This distinction is also made in State practice, for example, India has a different protection system for minorities, whose rights have an element of permanence, and for the Scheduled Castes and Scheduled Tribes, whose special rights are envisaged as temporary and exceptional measures to reduce the inequalities between communities.

[66] A.S. Akermark, Justifications of Minority Protection in International Law, London, Kluwer Law International, 1997, pp. 23-28.

Annex

QUESTIONNAIRE ON AFFIRMATIVE ACTION

1. What are the principal constitutional and legislative provisions relating to the principle of equality and the prohibition of discrimination? Please provide copies of the relevant provisions.

2. Provide landmark judgements relating to the principle of equality and the prohibition of discrimination.

3. Are there any provisions of a constitutional, legislative or executive nature referring to the concept of "affirmative action" and/or of so-called "positive" or "reverse" discrimination? If so, please provide copies of the relevant provisions.

4. What is, according to those provisions or to national case law, the relationship between the prohibition of discrimination and the concept of affirmative action?

5. Provide examples of national affirmative action schemes implemented pursuant to those provisions.

6. What groups are targeted by those affirmative action schemes (gender, racial groups, specific minorities, indigenous peoples, migrants, disabled persons, veterans, etc.)?

7. To what fields do those affirmative action schemes apply (education, employment, housing, transportation, ballot box, training, appointments to political, executive or judicial posts, awarding contracts or scholarships, others)?

8. What is the historical context in which those affirmative action schemes have been adopted?

9. What are the objectives stated in relation to those affirmative action schemes?

10. Are there any limits set to those affirmative action schemes and how will it be determined whether and when the objectives of those affirmative action schemes will be achieved?

11. Do the affirmative action schemes apply equally to all groups or are any distinctions made in favour of one or more specific groups over others? How are those specific groups defined?

12. Is there any national case law relating to those affirmative action schemes? If so, please provide copies of the principal judgements.

13. Are there any specific bodies, authorities, commissions, tribunals or courts competent to hear complaints in relation to the implementation and operation of affirmative action schemes?

14. Who is entitled to lodge complaints and start proceedings before such organs?

15. Provide, if available, statistics indicating the success of affirmative action schemes and particularly the progress made since their introduction.

Note. In the case where affirmative action schemes relating to different groups have been adopted, the answers should be given for each group specifically.